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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/656,643	09/05/2003	Geoffrey Alan Williams	P15650	8108

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EXAMINER

GELLNER, JEFFREY L

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 04/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Applicati n No.

10/656,643

Applicant(s)

WILLIAMES, GEOFFREY ALAN

Examiner

Jeffrey L. Gellner

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 19 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) 2 and 7-12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-6 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB08)  
Paper No(s)/Mail Date 4 Dec. 2003.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election with traverse of Invention I - seedling tray- and Species A - Figs. 1-7 - in the paper received 19 March 2004 is acknowledged. The traversal is on the ground(s) that the nursery tray and its method of making are similar, the election takes into account both product and method, and it is not apparent to applicant how the tray could be produced by the method described by examiner (Response page 1<sup>st</sup> para.). This is not found persuasive because:

As to the first argument, the tray and method of making the tray differ in inventive concept leading to different search areas. The increased searching would be a burden on the Examiner.

As to the second argument, Examiner can readily perceive of taking a tray assembly (such as by Ingerstedt et al. (US 3,938,281)) and annealing seedling pots (previously made) in the cutouts.

As to the third argument, the restriction/election requirement is in two parts. The first is the restriction which requirement which is based on the claims. Upon election of an invention, in the instant case Invention I, applicant was further required to elect among species (which are embodiments) defined by the figures (see MPEP 808.01(a) and 809.02(a)). In the instant case, the figures are not considered to show a method. In addition, not all figures were included in the election requirement because the elements in some figures were considered not claimed and not all the figures disclosed patentably distinct embodiments.

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The requirement is still deemed proper and is therefore made FINAL. Claims 2 and 7-12 are withdrawn from examination as it is drawn to the nonelected species.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, and 4 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,3, and 4 of U.S. Patent No. 6,651,384 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are drawn to a nursery tray formed from a sheet of polymer material having thicker and thinner zones, spaced apart indexing apertures in the thicker zone, and a plurality of rows of cells. The dependent claims disclose similar limitations.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 5 are rejected under 35 U.S.C. §102(b) as being anticipated by Nicholson (US 5,274,953; document F on Applicant's 1449).

As to Claim 1, Nicholson discloses a nursery tray (Figs. 1 and 2) formed from a sheet of polymer material ("plastic seedling tray" of col. 2 lines 20-25) having spaced thicker and thinner defined zones (thicker is region around 18 in Fig. 2 and thinner is region, for example, around 12 in Fig. 2), each of the thicker zones having an upper surface (Figs. 1 and 2), the nursery tray having at least two rows of aligned, spaced apart indexing apertures (22 of Figs. 1 and 2) formed in the thicker zones of the sheet, and a plurality of rows spaced apart open top cells (11 of Figs. 1 and 2) located between the rows of indexing apertures, the cells adapted to be filled with growing medium for plants (abstract), the open tops of the cells and the upper surface of the thicker zones having the indexing aperture being substantially coplanar (that is, the tops of cells of Fig. 2 and the end of the flange (above the leadline of 18) in Fig. 2 are coplanar).

As to Claim 5, Nicholson further discloses peripheral flanges (18 of Fig. 2) at opposite edges, each with indexing apertures, each flange with a depending stiffening flange (region of flange 18 in Fig. 2 that is below 22).

### ***Claim Rejections - 35 USC §103***

The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3 and 4 are rejected under 35 U.S.C. §103(a) as being unpatentable over Nicholson (US 5,274,953; document F on Applicant's 1449) in view of Kuben (DE 4420189 C1).

As to Claim 3, the limitations of Claim 1 are disclosed as described above. Not disclosed are stiffening ribs between some of the cells, the stiffening ribs extending laterally relative to the rows of indexing apertures. Kuben, however, discloses stiffening ribs (26 of Fig. 9) between cells, the stiffening ribs extending laterally relative to the rows of indexing apertures (ribs 26 at the left and right ends on tray in Fig. 9 extend laterally). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the tray of Nicholson by adding stiffening ribs as disclosed by Kuben so as to direct water flow to the plants.

As to Claim 4, Nicholson as modified by Kuben further disclose bridging material between cells (region between cells in Figs. 1 and 2 of Nicholson or between cells in Figs. 6, 9, 10 of Kuben), the stiffening ribs comprising upwardly open grooves (32 of Fig. 6) located the bridging material without communicating with the cells.

Claim 6 is rejected under 35 U.S.C. §103(a) as being unpatentable over Nicholson (US 5,274,953; document F on Applicant's 1449) in view of Bohlmann (US 5,022,183; document D on Applicant's 1449).

As to Claim 6, the limitations of Claim 1 are disclosed as described above. Not disclosed is the cells vacuum formed in the thinner zone. Bohlmann, however, discloses a tray with cells vacuum formed (col. 2 lines 45-46) which in the sheet of Nicholson would be the thinner zone. It would have been obvious to one of ordinary skill in the art at the time of the invention to

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modify the tray of Nicholson by making the cells by vacuum forming so as to use an inexpensive and easily used method of production.

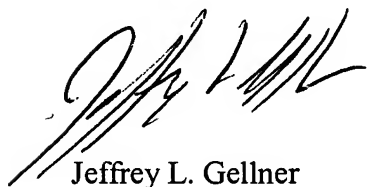
### *Conclusion*

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Kuznetsov et al. disclose in the prior art a tray with ribs. Williams ('996) disclose other trays by the instant inventor. Williams ('210 A1) is the instant application's pre-grant publication.

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Jeffrey L. Gellner whose phone number is 703.305.0053. The Examiner can normally be reached Monday through Thursday from 8:30 am to 4:00 pm. The Examiner can also be reached on alternate Fridays.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Peter Poon, can be reached at 703.308.2574. The official fax telephone number for the Technology Center where this application or proceeding is assigned is 703.872.9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703.308.1113.



Jeffrey L. Gellner